Supreme Court, U.S.
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In The

SUPREME COURT OF THE UNITED STATES

October Term, 1995

DOUGLAS BINDERUP, et al.,
Petitioners,

vs.

LARRY BROOKS AND FRANK D. ELLIS, II,
Respondents,

On Petition for Certiorari to the Court of Appeal of California,
Third Appellate District

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

I. Does the California statutory scheme authorizing defamation lawsuits against grand jurors violate the right to due process guaranteed by the Fifth and Fourteenth Amendments to the U.S. Constitution.

II. Does the California statutory scheme authorizing defamation lawsuits against grand jurors violate the right to equal protection of laws guaranteed by the Fifth and Fourteenth Amendments to the U.S. Constitution.

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PETITION FOR WRIT OF CERTIORARI

Official and Unofficial Reports

Brooks v. Binderup
39 Cal.App.4th 1287; 46 Cal.Rptr.2d 501;
__ P.2d __ (Nov. 1995)

Basis of Jurisdiction

Petitioners invoke this court's jurisdiction pursuant to 28 U.S.C. §1257 because the ruling of the Court of Appeal for the State of California, Third Appellate District, violates petitioners' rights to due process and to the equal protection of laws as guaranteed by the United States Constitution, and because the important issues of federal law raised have not been settled or even addressed by the United States Supreme Court.

The Court of Appeal for the State of California, Third Appellate District, filed its opinion on November 1, 1995. The California Supreme Court denied review on February 23, 1996.

I. CONSTITUTIONAL AND STATUTORY PROVISIONS IN ISSUE

U.S. Constitution, Amendment V

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of

a grand jury, excepting cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation."

U.S. Constitution, Amendment XIV

"No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

California Penal Code Section 911

"The following oath shall be taken by each member of the grand jury: 'I do solemnly swear (affirm) that I will support the Constitution of the United States and of the State of California, and all laws made pursuant to and in conformity therewith, will diligently inquire into, and true presentment make, of all public offenses against the people of this state, committed or triable within this county, of which the grand jury shall have or can obtain legal evidence. Further, I will not disclose any evidence brought before the grand jury, nor anything which I or any other grand juror may say, nor the manner in which I or any other grand juror may have voted on any matter before the grand jury. I will keep the charge

that will be given to me by the court.'"

California Penal Code Section 924.1

"(a) Every grand juror who, except when required by a court, willfully discloses any evidence adduced before the grand jury, or anything which he himself or any other member of the grand jury has said, or in what manner he or she or any other grand juror has voted on a matter before them, is guilty of a misdemeanor.

(b) Every interpreter for the disabled appointed to assist a member of the grand jury pursuant to Section 939.11 who, except when required by a court, willfully discloses any evidence adduced before the grand jury, or anything which he or she or any member of the grand jury has said, or in what manner any grand juror has voted on a matter before them, is guilty of a misdemeanor."

California Penal Code Section 924.2

"Each grand juror shall keep secret whatever he himself or any other grand juror has said, or in what manner he or any other grand juror has voted on a matter before them. Any court may require a grand juror to disclose the testimony of a witness examined before the grand jury, for the purpose of ascertaining whether it is consistent with that given by the witness before the court, or to disclose the testimony given before the grand jury by any person, upon a charge against such person for perjury in giving his testimony or upon trial therefor."

California Penal Code Section 930

"If any grand jury shall, in the report above mentioned, comment upon any person or official who has not been indicted by such grand jury such comments shall not be deemed to be privileged."

II. STATEMENT OF REASONS FOR REVIEW

Petitioners are the citizen-conscript members of the 1993-1994 Yuba County, California, Grand Jury who have been sued for defamation by two public officials. The allegedly defamatory statements were contained in two interim Grand Jury Reports. 39 Cal.App.4th 1287; Appendix, Exhibit A. The reports were prepared in the course of the Grand Jurors' statutorily-mandated duty to perform a "watchdog" function by investigating and reporting on various aspects of local government. Id.

Petitioners brought a Motion for Judgment on the Pleadings arguing that California Penal Code section 930, which authorizes the suit, is unconstitutional as applied to themselves. Because of the strict secrecy prohibiting disclosure of evidence presented to or considered by a grand jury, their investigations, deliberations, discussions and voting, California grand jurors are prevented from defending themselves in such a suit. The rights and process afforded all citizens as civil defendants are denied to these citizen-conscripts and all California grand jurors, because they simply cannot obtain a meaningful hearing before their property is confiscated in the form of damages.

The trial court granted Petitioners' Motion for Judgment on the Pleadings and entered judgment in Petitioners' favor, finding California Penal Code section 930 as applied denied petitioners due process and equal protection. The California Court of Appeal, Third Appellate District, reversed. 39 Cal.App.4th 1287; Appendix, Exhibit A.

The Court of Appeal agreed that the Grand Jurors were prohibited from disclosing evidence brought before them and the content of their deliberations, but it found that the disadvantages could be compensated for, so that they were not of such a magnitude as to offend due process. 39 Cal.App.4 1287; Appendix, Exhibit A. The Court of Appeal also rejected Petitioners' equal protection argument, characterizing the question as solely a legislative concern and deferring to the Legislature without any constitutional review whatsoever. Id.

Petitioners sought review in the California Supreme Court. Review was denied February 23, 1996. Appendix, Exhibit C.

All persons within the United States of America enjoy certain basic rights and protections, before their private property is taken from them. The effective assistance of counsel and a meaningful hearing are so basic as to be unquestioned. Unless this writ is granted, Petitioners and California grand jurors generally will be deprived of these basic rights enjoyed by all others.

The secrecy of grand jury deliberations, including its investigations, information given to them by others and even the

identity of these witnesses, is the touchstone of the grand jury system. Unfortunately, the need for this extreme secrecy causes constitutional deprivations to citizens who are drafted to serve as grand jurors. When sued for defamation, these citizens, of all citizens, are unable to consult with counsel or obtain a meaningful hearing as to their civil responsibility.

Petitioners have been sued for compensatory and exemplary damages by plaintiff--public officials. While embraced as citizen-conscripts, and while listened to as grand jurors, Petitioners as defamation defendants have been disowned by both the judicial and the executive branches of government. The California Court of Appeal determined in 1978 that California grand jurors could be sued for defamation despite the usual judicial privilege or immunity from suit, because the grand jurors weren't really judicial officers. Gillette-Harris-Duraceau & Associates, Inc. v. Kemple, 83 Cal.App.3d 214, 147 Cal.Rptr. 616 (1978). The County itself, who is the intended beneficiary of the grand jury's investigations, has, on behalf of the executive branch, refused to acknowledge an obligation to defend and to indemnify these unfortunates for statements made in their official reports.

Unless this writ is granted, Petitioners will be required to commit criminal offenses in order to be able to obtain the effective assistance of counsel and a fair hearing before their property is taken. As will be shown below, Petitioners are required by their oath and by criminal penalties from disclosing what they know to others. Petitioners cannot tell their attorneys the identities of people who came forward to give them information and testimony

about plaintiff-public officials, the information they provided, or the documents examined. Any attorney, thus blindfolded, cannot be of direct or economical assistance to his client.

Petitioners, even if they could share this information with their attorneys, could not do so in deposition or at hearing or trial. There are no exceptions in the statutory framework to the bar of secrecy. Petitioners need to have the ability to prove the truth of their statements. They need to tell their attorneys what information they received and from whom, in order for their attorneys to develop that information in formal discovery. They need ultimately to produce that information in trial. They cannot do so when handcuffed by oath and by criminal sanctions.

Unless this writ is granted, Petitioners' attorneys will not be able to impeach adverse witnesses at trial with their prior inconsistent statements made during secret grand jury sessions. The right to impeach a hostile witness with prior inconsistent statements is an integral part of one's ability to defend oneself in any civil action. Most of the information provided to grand juries about public officials comes from subordinate employees. If publicly identified and if required to state their views publicly, witnesses will often deny their criticisms of their superiors previously communicated to grand jurors.

In addition to proving truth, Petitioners must be able to prove their absence of malice. An important, if not essential, way to show absence of malice is to set out before the trier of fact the documents, statements and other information upon which the

allegedly libelous statements were based. Building on such evidence, especially in the case of grand jurors, might show that they considered tens of thousands of pages of documents before arriving at their allegedly libelous conclusions. Every libel defendant in the land, excepting only these citizen-conscripts, can do exactly that. Every other libel defendant can show that even though his or her statements might have been other than literally true, they weren't made or published in conscious disregard of their truth, because substantial, credible information was presented to them that demonstrates their absence of malice. Only grand jurors in the State of California are denied this critical defensive opportunity.

III. ARGUMENT

A. U.S. Supreme Court Jurisdiction

The U.S. Supreme Court has appellate jurisdiction to review final judgments or decrees rendered by the highest court of a State in which a decision may be had where the validity of a State statute is drawn into question on the ground of its being repugnant to the Constitution, treaties or laws of the United States. 28 U.S.C. §1257(a).

The U.S. Supreme Court has jurisdiction to hear Petitioners' case. The trial court found Respondents' lawsuit against Petitioners unconstitutional and entered judgment in favor of Petitioners. The Court of Appeal of California, Third Appellate District, reversed the trial court's judgment, finding no violation of due process or

equal protection and remanded for a trial on the merits. 39 Cal.App.4th 1287; Appendix, Exhibit A. Petitioners sought review by the California Supreme Court. Review was denied, finally disposing of the federal issues of constitutionality in state court. Appendix, Exhibit C. Although further state court proceedings are pending, the judgment is final for purposes of 28 U.S.C. section 1257(a).

In Cox Broadcasting Corp. v. Cohn, 420 U.S. 469, 95 S.Ct. 1029, 43 L.Ed.2d 328 (1975), the court recognized four categories of cases in which a judgment is deemed final and jurisdiction is proper even when further state court proceedings are anticipated. The instant case falls squarely within two of those categories.

Where the federal claim has been finally decided, with further proceedings on the merits in state court to come, but in which later review of the federal issue cannot be had whatever the outcome of the case, the Court has jurisdiction prior to the completion of the state court proceedings. Cox Broadcasting, 420 U.S. at 481-82. The present case satisfies this standard. The due process and equal protection issues have been finally decided by California's highest court. If Petitioners ultimately prevail on the merits, the federal issues will be mooted. If Petitioners do not prevail, the governing state law prevents them from again presenting their federal claims since the California courts would simply reject the claims under the law-of-the-case doctrine. Pennsylvania v. Richie, 480 U.S. 39, 47-50, 107 S.Ct. 989, 94 L.Ed.2d 40 (1987) addressed precisely this predicament. Additionally, should Petitioners be required to go to trial on the

merits while unsure of the constitutionality of the action against them, they may be forced to disclose the evidence and deliberations of the grand jury proceedings in an effort to defend themselves. This result would not only harm Petitioners by exposing them to criminal liability, but would also be to the detriment of the common weal and the grand jury system.

The instant case also falls within the last category described in Cox Broadcasting, 420 U.S. at 482-87. The federal issues have been finally decided by the California courts with further proceedings pending in which Petitioners may prevail on nonfederal grounds, thus rendering unnecessary review of the federal issues by the U.S. Supreme Court, and where reversal of the California court would be preclusive of any further litigation. As in Cox Broadcasting, the Court of Appeal decision is final on the federal issues, as the California Supreme Court has denied review. Petitioners will be liable for damages if the elements of the state cause of action are proved. While Petitioners may prevail at trial on nonfederal grounds, there would be no trial at all if the Court of Appeal erroneously upheld the statute. Even if Petitioners prevail at trial on nonfederal grounds and make further consideration of the constitutional question unnecessary, the question of whether California grand jurors must defend civil lawsuits without the constitutional rights afforded to other civil litigants will remain unreviewed by this court. Moreover, as explained below, denial of review would leave the grand jurors of California to operate under the cloud of civil and criminal sanctions imposed by a statutory scheme, the constitutionality of which is in serious doubt.

Since this case falls within two of the recognized categories in which the Court has treated the decision on the federal issues as final without awaiting the completion of the additional proceedings of the lower state courts, the judgment is final for purposes of 28 U.S.C. section 1257(a), and review should be had.

B. California Statutory Scheme

Although California grand juries have three basic functions, the one most often utilized is the "watchdog" role to investigate and report upon the affairs of local government. McClatchy Newspapers v. Superior Court, 44 Cal.3d 1162, 1170, 245 Cal.Rptr. 774, 751 P.2d 1329 (1988); Cal. Penal Code §§888, 919, 924, et seq. The grand jury is mandated by the legislature to investigate the operations of the officers, departments, or functions of California counties. Cal. Penal Code §925. The normal end product of a grand jury's activity is a final report containing the findings and recommendations on the subject of its investigation, which is then submitted to the presiding judge. Cal. Penal Code §933(a). Indeed, the report is the only means by which the grand jury can hope to effectuate its recommendations. McClatchy Newspapers, 44 Cal.3d at 1171. The "watchdog" function over the operations of a variety of governmental activities has a long and respected heritage in California. Id. at 1170-1171.

Also deeply rooted in legal tradition is the secrecy of grand jury proceedings. McClatchy Newspapers, 44 Cal.3d at 1173. The California Supreme Court has noted that secrecy is equally vital in the context of both the indictment and "watchdog" functions of

grand jury proceedings, as witnesses must be able to testify without fear of reproach by their peers or superiors. Id. at 1174-75. In fact, the need for secrecy is so vital to the statutory scheme that the California legislature has made disclosure of evidence, deliberations or votes the subject of criminal liability. Grand jurors are required by law to take a solemn oath not to disclose any evidence brought before the grand jury, anything said by a grand juror or how any grand juror voted on any matter. Cal. Penal Code §911. Any grand juror who willfully discloses such information is guilty of a misdemeanor. Cal. Penal Code §924.1. There is no exception allowing disclosure to one's attorney.

Despite the importance of the "watchdog" function and the mandate of grand jury secrecy, California Penal Code section 930 allows defamation lawsuits against grand jurors for statements contained in their reports. California Penal Code section 930 provides: "If any grand jury shall, in the report [on its investigation of county operations], comment upon any person or official who has not been indicted by such grand jury such comments shall not be deemed to be privileged." California grand jurors are subject, consequently, to lawsuits for defamation, but they are prevented from obtaining meaningful legal advice or assistance.

C. Procedural Due Process

The right to a fair hearing is guaranteed by the due process provisions of the Constitution. Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 314, 70 S.Ct. 652, 94 L.Ed. 865 (1950). Neither Respondents, nor the California Court of Appeal

disputed Petitioners' right to a fair hearing or their right to the effective assistance of counsel. Yet, allowing grand jurors to be sued for defamation while so restricted in their means to defend themselves denies them these fundamental rights.

It is well established that "actual malice" is an essential element of a defamation action brought by public officials. New York Times v. Sullivan, 376 U.S. 254, 279-80, 84 S.Ct. 710, 11 L.Ed.2d 686 (1964). To show actual malice, a party must prove that the defamatory statements were published with knowledge that they were false, or with reckless disregard for whether they were true or false. Id; Masson v. New Yorker Magazine, Inc., 501 U.S. 496, 510, 111 S.Ct. 2419, 115 L.Ed.2d 447 (1991). To prove reckless disregard, a party must show that the defendant in fact entertained serious doubts as to the truth of the publication or that the defendant published the statement with a high degree of awareness that it was probably false. Masson, 501 U.S. at 510. This standard necessarily involves a subjective inquiry into the defendant's state of mind. Harte-Hanks Communications, Inc. v. Connaughton, 491 U.S. 657, 688, 109 S.Ct. 2678, 105 L.Ed.2d 562 (1989); St. Amant v. Thompson, 390 U.S. 727, 732-33, 88 S.Ct. 1323, 20 L.Ed.2d 262 (1968).

Petitioners, of all United States citizens, cannot effectively present evidence to show their lack of actual malice. They cannot violate their oaths or their promises to witnesses to maintain in secret their identities and their information or testimony. They cannot produce or even describe the investigation which they conceived and performed or the thousands of documents that might

have been gathered and examined or analyzed. They cannot describe their deliberations or even whether they were for or against certain ideas. In sum, they cannot present the evidence they need to in order to demonstrate lack of actual malice.

The publication element also involves an inquiry into the defendant's state of mind. "Publication of defamatory matter is its communication intentionally or by a negligent act to one other than the person defamed." Hellar v. Bianco, 111 Cal.App.2d 424, 426, 244 P.2d 757 (1952); Restatement (Second) Torts §577 (1977). Both the elements of actual malice and publication place the defendant's state of mind directly into issue. Yet, grand jurors are precluded from disclosing the evidence or reasoning which led to their findings, or how they voted with respect to publication of the report and its contents.[1]

Grand jurors are also stifled in presenting the most basic and preferred defense to a defamation action -- truth. Unlike all other defendants who are sued for slander or libel, grand jurors cannot testify as to what they saw, heard, or learned about plaintiffs in order to prove the truth of the statements made. Even more stifling is the grand jurors' inability to disclose this information to their own attorneys. While truth is a defense, grand jurors are precluded from directing their attorneys to the information, witnesses, documents and data necessary to establish that, or any other, defense.

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[1]Plaintiffs in this case also seek punitive damages from Petitioners, which also requires an inquiry into Petitioners' states of mind.

In addition to being severely restricted from testifying on their own behalf as to the substance of their investigations, the grand jurors are procedurally restricted as well. Although they may have considered thousands of documents during the course of their investigation and taken notes of what they saw and heard, unlike other civil defendants, the grand jurors cannot refresh their recollections with these writings. California Evidence Code section 771 requires any writing used to refresh recollection be produced to all parties for use in cross-examination and potential admission into evidence. The result is that refreshing one's recollection exposes the grand juror defendant to criminal prosecution.

Grand jurors are also prevented from effective cross-examination. Grand jurors cannot tell their own attorney what a witness said during the grand jury proceedings, thereby precluding effective cross-examination. Furthermore, if such a witness changes testimony previously given in secret session, grand jurors cannot inform their attorneys so that effective impeachment may be made.

While the California Court of Appeal acknowledged these restrictions, it found no denial of due process based solely on the following analysis: "Although grand jurors may not disclose evidence brought before the grand jury or the content of grand jury deliberations, there are other sources of evidence to prove the truth of the grand jurors' comments and defend against allegations of malice. Indeed, the grand jury report itself provides a framework for discovery of evidence relevant to that issue. Common sense suggests that employees of the Yuba County Planning and Building

Department have knowledge of plaintiffs' conduct. Department documents might also aid in the defense." 39 Cal.App.4th 1287; Appendix, Exhibit A.

This cursory analysis underestimates the severity of the restrictions upon the grand jurors in presenting a defense. The mere possibility that other sources for the information may still exist does not afford Petitioners a meaningful opportunity to be heard. It does not address the grand jurors' inability to present evidence and testimony on their own behalf of their state of mind, the evidence that they heard and considered, or the way they voted. Nor does it address the fact that the grand jurors cannot direct their own attorneys to any of that available evidence.

Petitioners deserve fairer process than the mere possibility that they may be able to reconstruct alternative evidence in their own defense. The effect of California Penal Code section 930 is to subject Petitioners and other California grand jurors to civil liability for defamation, while they are denied the right to consult with their attorneys and to present relevant, available and exonerative evidence. Petitioners are entitled to more than this cursory review before they are denied the fundamental right to effective assistance of counsel and to the meaningful opportunity to be heard secured to them by the U.S. Constitution.

D. Equal Protection

The Equal Protection Clause is a restriction on state legislative action inconsistent with elemental constitutional

provisions. Plyler v. Doe, 457 U.S. 202, 102 S.Ct. 2382, 72 L.Ed.2d 786 (1982). The right to a meaningful opportunity to be heard is a fundamental right specifically enumerated and guaranteed by the Constitution. As a fundamental right, the right to a meaningful opportunity to be heard must be protected against denial by particular laws that operate to jeopardize it for particular individuals. Boddie v. Connecticut, 401 U.S. 371, 379-80, 91 S.Ct. 780, 28 L.Ed.2d 113 (1971). When a classification impinges upon a fundamental right, it is treated as presumptively invidious and its constitutionality must be independently reviewed to determine whether it is necessary to promote a compelling governmental interest. Plyler, 457 U.S. 202; Shapiro v. Thompson, 394 U.S. 618, 634, 638, 89 S.Ct. 1322, 22 L.Ed.2d 600 (1969).

Despite that statutes touching on fundamental rights are to be independently reviewed by the court with heightened scrutiny, the Court of Appeal passed over any independent judicial review of California Penal Code section 930, deferring completely to the balancing of interests that should have been done by the California Legislature in the first place. The Court of Appeal did not determine that the classification is necessary to achieve a compelling governmental interest as required by the Constitution. Had the Court of Appeal undertaken such a review, it would have seen that California Penal Code section 930 does not pass constitutional muster.

Section 930 exposes grand jurors to legal action under circumstances which deny them the fundamentally fair trial afforded to all other defendants in civil actions. The effect of Section 930 is

to create two classes of defendants in defamation actions: those defendants who may consult with their attorneys, testify on their own behalf, and present available evidence, and those defendants who cannot, because they happen to be California grand jurors. These restrictions are not placed on any other class of defendants in defamation lawsuits. Yet, Section 930 exposes them to severe civil penalties just the same. And, to add insult to the injuries of these citizen-conscripts, the counties for whose benefit they toil take the position that the county does not have to defend or to indemnify them.

The only justification which has been proffered for California Penal Code section 930 is that it provides a remedy for unindicted individuals wrongfully targeted for criticism in a grand jury report. 39 Cal.App.4th 1287; Appendix, Exhibit A. While such an interest is legitimate, it is not a compelling interest which would justify imposing liability without a full and fair opportunity to be heard in a meaningful manner. This is particularly the case where, as here, the individuals targeted are public officials. As noted in Gertz v. Robert Welch, Inc., 418 U.S. 323, 94 S.Ct. 2997, 41 L.Ed.2d 789 (1974), public officials have less need for a judicial remedy, because they enjoy greater access to the media and are therefore in a position to more effectively challenge the substance of disparaging statements.

Even if the interest in providing a judicial remedy were sufficiently compelling, Section 930 is not narrowly tailored to achieve that interest. There are many less intrusive means by which to provide a remedy to individuals adversely commented upon in

grand jury reports. In California Penal Code sections 916 and 933, the legislature has already adopted procedural safeguards to minimize the possibility of incorrect conclusions and the effect of findings and recommendations contained in a grand jury report. California Penal Code section 916 requires the grand jury adopt procedures for insuring that all findings included in the report are supported by documented evidence. Section 933 provides that comment by the governing body, elected county officer or agency head be submitted to the presiding judge and placed on file with the grand jury report when the findings pertain to matters under their control.

Other states have provided individuals with much less intrusive remedies. For example, under Alaska Rules of Criminal Procedure, Rule 6.1(a)-(e), a prerelease notice is served on an individual adversely commented upon in a grand jury "watchdog" report. The individual may move for a hearing, review the report and grand jury records, and present argument to the judge. The judge then decides whether the report is supported by substantial evidence and whether or not it may be released. Likewise, the State of Florida has a statute which provides that a grand jury report relating to an individual may not issue until the individual is furnished a copy and is afforded an opportunity to repress or expunge. FLA.STAT.ANN. §905.28 (West 1985).

California Penal Code section 930 is not narrowly tailored to achieve the governmental interest in providing a remedy to those adversely commented upon in grand jury reports. It is not necessary to subject grand jurors to civil liability while severely

restricting their ability to consult with their attorneys, testify on their own behalf, and present relevant and competent evidence. Of all states having grand jury "watchdog" functions, only California grand jurors have had the privilege for individual criticism contained in their reports withheld from them. They stand alone in being subject to the imposition of damages for their statements.

E. Conclusion

Petitioners' dilemma is unique in our constitutional system and repugnant to it. The evidence that can exonerate them is at their fingertips. It cannot, however, be utilized by them at trial. Its very existence, given the California statutory framework that ensures secrecy, cannot even be shared with their attorneys. To permit them to be tried under such circumstances makes a mockery of our cherished notions of fair play and substantial justice. This court should not stand by and permit states to levy compensatory and exemplary damages against the property of citizens who serve as grand jurors under such Draconian conditions.

Dated: May, 1996

Respectfully submitted,

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APPENDIX

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CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL FOR THE STATE OF CALIFORNIA

IN AND FOR THE THIRD APPELLATE DISTRICT

(Yuba)

LARRY F. BROOKS et al.,	)	C020328
	)	
Plaintiffs and Appellants,	)	(Super.Ct. No. 55667)
v.	)	
	)	
DOUGLAS F. BINDERUP, et al.,	)	
	)	
Defendants and Respondents.	)	
	)	

APPEAL from a judgment of the Superior Court of the County of Yuba, Raymond Roberts, Judge. Reversed.

Terry C. Brooks, for Plaintiffs and Appellants.

SEE CONCURRING OPINION

Porter, Scott, Weiberg & Delehant, James K. Mirabell, and Dennis M. Beaty;

McDonald, Saeltzer, Morris, Creeggan & Waddock, Jon S. Allin and Gregory R. Madsen; and Michael J. Farley and Robert Zaro, for Defendants and Respondents.

Larry F. Brooks, Yuba County Planning and Building Services Director, and Frank D. Ellis, II, the Deputy Director, sued individual members of the 1993-1194 Yuba County Grand Jury claiming they were defamed in two grand jury reports about the operation of their department. Plaintiffs cited Penal Code section 930[2], and alleged the reports were not privileged because the grand jury returned no indictment against them.

Defendants moved for judgment on the pleadings, offering a multifaceted constitutional challenge to section 930. The gist of defendants' argument was that if the comments about plaintiffs were not privileged pursuant to section 930, and plaintiffs were free to sue them for defamation, other Penal Code sections requiring the secrecy of grand jury proceedings prevented them from mounting an effective defense. Defendants insisted that as public officials they would be unable to defend against

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[2] Penal Code section 930 provides; "If any grand jury shall, in the report [on its investigation of county operations], comment upon any person or official who has not been indicted by such grand jury such comments shall not be deemed to be privileged."

allegations of actual malice because section 924.1 and 924.2 prohibited disclosure of their state of mind during grand jury deliberations.

The trial court granted defendants' motion on grounds the statute, as applied, denied them due process. We reverse for reasons we shall explain.

DISCUSSION

I

Secrecy and the Grand Jury's Watchdog Function

The California Supreme Court detailed grand jury operations in *McClatchy Newspapers v. Superior Court* (1988) 44 Cal.3d 1162. It also acknowledged the tension between the need for secrecy and the risk individuals and public officials might be wrongfully criticized in grand jury reports.

"The California grand jury has three basic functions: to weigh criminal charges and determine whether indictments should be returned (§ 917); to weigh allegations of misconduct against public officials and determine whether to present formal accusations requesting their removal from office (§ 922; see Gov. Code, §3060 et seq.); and to act as the public's 'watchdog' by investigation and reporting upon the

affairs of local government (e.g., §§ 919, 925 et seq.)." (*McClatchy Newspapers v. Superior Court, supra,* 44 Cal.3d at p. 1170.) The watchdog role is the one most often played by the modern grand jury in California (ibid.), and the function involved in this appeal.

Historical records suggest California grand juries exercised their watchdog function from the time of statehood. (Olson, The California Grand Jury: An Analysis and Evaluation of Its Watchdog Function (1965 master's thesis) pp. 69-70.) In 1880, the Legislature officially expanded the duties of grand juries to include investigation of county government. (Code Amends. 1880, ch. 109, § 1, p. 43; Petersen, *The California Grand Jury System: A Review and Suggestions For Reform* (1974) 5 Pacific L.J. 1, 4.) An 1897 amendment to former section 928 provided "that if any grand jury shall, in the report above mentioned, comment upon any person or official who has not been indicted by the said grand jury, the said comments shall not be deemed to be privileged." (Stats. 1897, ch. 142, § 2, p. 205.) There has been no material change in the language of the statute since its adoption 98 years ago. (Stats. 1911, ch. 200, § 1, p. 373; Stats. 1917, ch. 119, § 1, p. 167; Stats. 1919, ch. 112, § 1, p. 157; Stats. 1923, ch. 177, § 1, pp. 419-420; Stats. 1929, ch. 287, § 1, pp. 590-591; Stats. 1943,

ch. 93, § 1, pp. 798-799; Stats. 1955, ch. 1297, § 1, pp. 2368-2369; Stats. 1957, ch. 1364, § 1, p. 2699; Stats 1959, ch. 501, § 2, p. 2450 [adding new § 930].) Nothing in the historical accounts or legislative materials indicates the comments addressed in section 930 and former section 928 were privileged before 1897.

The normal end product of the grand jury's activity is a final report which contains the findings and recommendations on subjects of its investigations. (*McClatchy Newspapers v. Superior Court, supra,* 44 Cal.3d at p. 1171; § 933, subd. (a).) The grand jury submits its report on county government matters to the presiding judge of the superior court. (§ 933, subd. (a).) Although the court may, in limited circumstances, refuse to file al grand jury report, "'[t]he court has no authority either to impose its own views on the grand jury or to suppress a report simply because it considers it ill-advised, insufficiently documented or *even libelous.*'" (*McClatchy Newspapers v. Superior Court, supra, (1973 Grand Jury)* (1975) 13 Cal.3d 430, 439, emphasis added.)

The secrecy of grand jury proceedings is deeply rooted in legal tradition. (*McClatchy Newspapers v. Superior Court, supra,* 44 Cal.3d at p. 1173.) The California Legislature incorporated this tradition into the Penal Code. (*Ibid.*) Under the oath

administered to grand jurors, each makes the following promise: "I will not disclose any evidence brought before the grand jury, nor anything which I or any other grand juror may say, nor the manner in which I or any other grand juror may have voted on any matter before the grand jury." (§ 911.) Willful disclosure of evidence, deliberations, or votes of grand jurors is a misdemeanor. (§ 924.1.)

The need for secrecy is vital when the grand jury pursues its criminal indictment function. It is also important when the grand jury conducts a watchdog investigation of local government operations. "Compared with indictment proceedings, the efficacy and credibility of watchdog investigations no less require that witnesses testify without fear of reproach by their peers or their superiors. Though the watchdog investigation and report serve a different social purpose than the criminal indictment, eliciting candid testimony is obviously critical to both functions of the grand jury." (*McClatchy Newspapers v. Superior Court, supra,* 44 Cal.3d at p. 1175.) Secrecy protects the reputations of individuals who are unjustly accused in the course of an investigation. (*Id.* at p. 1176.)

However, courts and commentators have long recognized the vulnerability of unindicted individuals who are openly criticized in grand jury reports. (See, e.g.,

Comment, *Legality of the Grand Jury Report* (1954) 52 Mich.L.Rev. 711; Note, *The Grand Jury Report as an Infringement of Private Rights* (1972) 23 Hastings L.J. 561, 572-575; and Kuh, *The Grand Jury "Presentment": Foul Blow or Fair Play?* (1955) 55 Colum.L.Rev. 1103; and cases cited in those articles.) An indictment charges the individual with a violation of a known and certain public law; it is the first step in a series of proceedings in which the accused may exercise the right to a public trial, jury, counsel, confrontation of witnesses, and, if convicted, to an appeal. "'A report, on the contrary, based as it is upon the grand jury's own criteria of public or private morals, charges the violation of subjective and unexpressed standards of morality and is the first and last step of the judicial process. It is at once an accusation and a final condemnation, and, emanating from a judicial body occupying a position of respect and importance in the community, its potential for harm is incalculable.'" (*McClatchy Newspapers v. Superior Court, supra,* 44 Cal.3d at p. 1176, *quoting Wood v. Hughes* (1961) 9 N.Y.2d 144 [212 N.Y.S.2d 33, 39-40, 173 N.E.2d 21].)

In this context, section 930 provides a remedy for unindicted individuals wrongfully targeted for criticism in a grand jury report. (*McClatchy Newspapers v. Superior Court, supra,* 44 Cal.3d at p. 1177.) In *Gillette-Harris-Duranceau &*

Associates, Inc. v. Kemple (1978) 83 Cal.App.3d 214, 222-223, the court rejected the claim section 930 resulted in an unconstitutional impairment of judicial privilege. Recognizing there was no forum in which an individual criticized by the grand jury could present his or her version of the facts, the court concluded there was "ample justification for the Legislature's decision to enact section 930 and thereby eliminate the claim of privilege in connection with the grand jury's report on local government." (*Ibid.*) However, the judicial privilege remains in place to protect grand jurors from civil liability when they are conducting investigations pursuant to their constitutional authority to indict. (*Id.* at pp. 221-222.)

We turn now to the specific constitutional issues raised in this appeal.

II

Substantive Due Process

The parties agree the federal and state Constitutions guarantee that the state may not deprive individuals of life, liberty, or property without due process of law. Defendants convinced the trial court section 930 was unconstitutional as applied because it unfairly exposed them to civil liability. Responding to plaintiffs' arguments

in this appeal, they insist "numerous life, liberty, and property interests of the grand jurors are severely impacted by the Legislature's removal of the judicial privilege." Defendants also state that "[i]n essence, grand jury reports on the affairs of local government are public improvements, the cost of which should be distributed throughout the community."

The trial court's ruling ignores several flaws in defendants' argument. The "cost" of an allegedly defamatory grand jury report is not, in fact, distributed through the community. Defendants acknowledge Yuba County does not provide indemnification to grand jurors.

If the cost in defendants' analogy is the damage to the reputation caused by the grand jurors' defamatory comments, that cost is borne by the individuals targeted in the report. Those individuals are powerless to prevent a grand jury investigation and, given the statutes mandating secrecy, lack access to information they might otherwise use to clear their names. The Legislature balanced the costs to the target of grand jury criticism against the costs to grand jurors, that is, the expense of defending against a defamation action and the risk of potential judgment against them. By eliminating the judicial privilege in these circumstances, section 930 encourages grand

jurors to proceed cautiously when commenting on the conduct of unindicted individuals and public officials.

Thus, defendants may not blame their troubles on section 930. After the grand jury is impaneled, a superior court judge instructs the grand jurors on their powers, duties, and responsibilities, including those set forth in section 930. (§ 914.1.)[3] We presume the superior court performed its duty pursuant to section 914.1 and informed defendants that comments in grand jury reports pertaining to unindicted individuals are not privileged. (Evid. Code, § 664.) Having been so informed, defendants acted at their own peril when they included in their reports comments criticizing plaintiffs' conduct. We conclude there was no violation of substantive due process.

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[3] Section 914.1 provides: "When a grand jury is impaneled, for purposes which include the investigation of, or inquiry into, county matters of civil concern, the judge of the superior court of the county, in addition to other matters requiring action, shall call its attention to the provisions of Chapter 1 (commencing with Section 23000) of Division 1 of Title 3, and Sections 24054 and 26525 of the Government Code, and instruct it to ascertain by a careful and diligent investigation whether such provisions have been complied with, and to note the result of such investigation in its report. *At such time the judge shall also inform and charge the grand jury especially as to its powers, duties, and responsibilities under* Article 1 (commencing with Section 888) of Chapter 2, and Article 2 (*commencing with Section 925)*, Article 3 (commencing with Section 934) of this chapter, Article 3 (commencing with Section 3060) of Chapter 7 of Division 4 of Title 1 of the Government Code, and Section 17006 of the Welfare and Institutions Code." (Emphasis added.)

III

Procedural Due Process

The parties also agree that procedural due process encompasses the constitutional right to notice, to confront and cross-examine witnesses, and to be heard in a meaningful way. Plaintiffs challenge defendants' argument, apparently accepted by the trial court, that section 930 deprives defendants of the right to procedural due process because other statutes prevent them from exercising their fundamental right to offer relevant and competent evidence in defense of plaintiffs' defamation claims.

Nothing in section 930 specifically denies defendants the right to defend against allegations of defamation; it merely removes the grand jury's privilege to defame in these circumstances. Although grand jurors may not disclose evidence brought before the grand jury or the content of grand jury deliberations, there are other sources of evidence to prove the truth of the grand jurors' comments and defend against allegations of malice. Indeed, the grand jury report itself provides a framework for discovery of evidence relevant to that issue. Common sense suggests

that employees of the Yuba County Planning and Building Department have knowledge of plaintiffs' conduct. Department documents might also aid in the defense. In addition, the grand jury foreman and district attorney may jointly request a public grand jury session. (§ 939.1.) The court may grant the request if it finds "the subject matter of the investigation affects the general public welfare, involving the alleged corruption, misfeasance, or malfeasance in office or dereliction of duty of public officials or employees or of any person allegedly acting in conjunction or conspiracy with such officials or employees in such alleged acts, . . ." (*Ibid.*)

We conclude the court erred in ruling section 930 deprived defendants of procedural due process. We do not address the propriety of enforcing grand jury secrecy statutes in this context because the issue is not presented in this appeal.

IV

Equal Protection

Having concluded there was no due process violation, we consider and reject defendants' other constitutional claim. Defendants assert section 930 is unconstitutional because it treats grand jurors differently than all other civil litigants.

"This is because it exposes them to legal action under circumstances which deny them the fundamentally fair trial which is available to all other civil defendants." We decline to assume the legislative function and create grand jury immunity where none has ever existed before. Moreover, it is for the Legislature to weigh the competing interests to determine whether, as a matter of policy, the tradition of grand jury secrecy should be abandoned in these circumstances. Given the present statutory scheme, we conclude plaintiffs' cause of action was sufficient to survive a motion for judgment on the pleadings.

DISPOSITION

The judgment is reversed. Plaintiffs shall receive costs on appeal. (CERTIFIED FOR PUBLICATION.)

BROWN, J.

I concur:

RAYE, J.

I concur in Justice Brown's scholarly opinion. I write separately to point out some other problems with defendants' position in this case.

Having been sued for defamation, defendants suggest a basic unfairness in the way statutes governing a grand jury apply to them. On the one hand, the statutes prohibit them from disclosing evidence adduced before the grand jury. (E.G., Pen. Code, § 924.1.)[1] This prohibition limits their defense, particularly as it disenables them from showing a lack of malice. On the other hand, section 930 provides, in the circumstances present here, that comments made in their grand jury report shall not be privileged, so defendants may be held liable. In essence defendants complain it is unfair that they can be sued but cannot defend themselves.

Theoretically, there are two possible remedies to the unfairness claimed by defendants: (1) permit disclosure of evidence received by the grand jury and considered by it in preparing the subject report, or (2) immunize the grand jurors from liability. In this proceeding, defendants have focused exclusively on the second remedy. In my view, their argument is untenable, for reasons that follow.

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[1] Further nondescript statutory references are to the Penal Code.

Defendants implicitly argue that the invalidation of section 930 would leave them with a privilege or would otherwise immunize them from liability. This argument is unsound. The reports of a grand jury, performing its watchdog function over local government, have never been subject to a privilege in this state, nor have grand jurors issuing such a report been immunized from claims of defamation.

Defendants argue that immunity for such a report may be found in *Irwin v. Murphy* (1933) 129 Cal.App. 713. However, that case did not involve the 'watchdog' power of the grand jury; rather, there the report was issued as an incident of the grand jury's power to indict. "[A]n important distinction must be made between a grand jury's authority to indict and its authority to exercise a "watchdog" function in matters of local government. The latter activity is a unique creature of the California Legislature, which has a long and well respected heritage. [Citation.] Since the grand jury's power to investigate and report on matters pertaining to local government is a creature of statute, the Legislature is at liberty to impose reasonable limitations upon the exercise of this watchdog function. Section 930 imposes such a limitation." (*Gillette-Harris-Duranceau & Associates, Inc. v. Kemple* (1978) 83 Cal.App.3d 214, 221.)

Thus, defendants ask us to do more than simply invalidate section 930. In essence, they ask us to *create* a privilege or an immunity where none has ever existed in this state. In my view, there is no convenient doctrine of privilege or immunity that will support defendants' request. The logical doctrinal candidate would be judicial immunity, upon the theory that the grand jury is a part of the judicial system and is therefore entitled to traditional judicial immunity. (See *Turpen v. Booth* (1880) 56 Cal. 65, 69.) However, "[T]he grand jury's function of investigating and reporting on local government is not inherently a part of the judicial systems." (*Gillette-Harris-Duranceau & Associates, Inc. v. Kemple, supra,* 83 Cal.App.3d at p.222.)

Thus, defendants ask us to create a new privilege or immunity out of whole cloth. In my view, this task is not an appropriate judicial function but is rather reserved to the Legislature, which, by enactment of section 930, has expressly rejected the relief defendants seek.

Even if this court were properly empowered to create a privilege or immunity for the grand jurors' report, I would not do so. One who is defamed by a grand jury report has no viable remedy other than a lawsuit: "[T]here is no forum in which an individual who has been unfavorably mentioned by the grand jury may present his

version of the facts." (*Gillette-Harris-Duranceau & Associates, Inc. v. Kemple, supra,* 83 Cal.App.3d at p. 222.)

At the outset, I posited two ways to remedy the unfairness claimed by defendants: (1) permit disclosure of grand jury evidence, or (2) immunize the grand jurors. Defendants have made no claim as to the first remedy, which, in my view, would require a fact-specific request in the trial court. Consequently, that issue is not before us. However, I note that section 924.1 prohibits disclosure of grand jury evidence "except when required by a court." I also note that constitutional due process may require the production of evidence ordinarily protected from disclosure by statute. (See, e.g., *Pennsylvania v. Ritchie* (1987) 480 U.S. 39 [94 L.Ed.2d 40].) Whether these concepts may be applied to authorize the defendants to reveal evidence adduced before the grand jury must await the day when such a claim has been properly tendered.

SIMS

_____, Acting P.J.

IN THE

Court of Appeal of the State of California

IN AND FOR THE
THIRD APPELLATE DISTRICT

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COURT OF APPEAL-THIRD DISTRICT
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LARRY F. BROOKS AND FRANK D. ELLIS II
Plaintiff and Appellant

vs.

3 Civil C020328
Yuba 55667

DOUGLAS F. BINDERUP ET AL.
Defendant and Respondent

By the Court:

Respondents' petition for rehearing is denied.

Dated: November 29, 1995

SIMS, Acting P.J.

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cc: See Mailing List

Third Appellate District No. C020328

S050548

IN THE SUPREME COURT OF CALIFORNIA

SUPREME COURT
FILED
FEB 22 1996
Robert Wandruff Clerk
DEPUTY

LARRY F. BROOKS Et Al., Appellants

v.

DOUGLAS F. BINDERUP Et Al., Respondents

Petitions for review DENIED.

Mosk, J. and Kennard, J. are of the opinion review should be granted.

Lucas

Chief Justice